Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-736

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVELYN WANKOFF,
ADMINISTRATRIX OF THE ESTATE
OF IRVIN WANKOFF, DECEASED, AND
EVELYN WANKOFF IN HER OWN RIGHT,

Petitioner,

vs.

THOMAS TIBBS AND CONSOLIDATED
FREIGHTWAYS CORPORATION AND
THOMAS JEFFERSON UNIVERSITY HOSPITAL,
ADDITIONAL DEFENDANT,

Respondents.

REPLY BRIEF OF PETITIONER IN OPPOSITION TO BRIEF OF RESPONDENT THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT

MALCOLM P. ROSENBERG, ESQUIRE
Malcolm P. Rosenberg & Associates
1201 Chestnut Street
13th Floor
Philadelphia, Pennsylvania 19107-4136
(215) 557-9690

QUESTION PRESENTED

1. Did the state courts avoid deciding upon the federal constitutional questions, which were timely and adequately raised by Petitioner, by putting forward nonfederal grounds of decision which were without any fair or substantial support, by rendering and affirming a judgment of non pros based upon misapplication of the law and repealed rules of the court; all of which was in the absence of a hearing?

TABLE OF CONTENTS

Questions Presented i
Table of Authorities iii
Jurisdiction 2
Statement of the Case 2
Reasons for Granting the Writ 5

I. The State Courts' nonfederal basis for its decision was without fair or substantial support 5

II. The Lower Court Abused its Discretion Per Se 10

Conclusion 12

TABLE OF AUTHORITIES

Case — Page

Austin v. Southeastern Pennsylvania Transportation Authority, 450 A.2d 98, 304 Pa. Super. 56 (1982) 5, 7, 9, 10

Cardinale V. Louisiana, 394 U.S. 437, 439 (1969) 2, 8, 9

DeSiato v. Shahboz, 419 A.2d 798, ___ Pa. Super. ___ (1980) 11

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 2, 8, 9

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 7

Poluka v. Cole, 295 A.2d 132, 222 Pa. Super. 500 (1972) 11

Taylor v. Oxford Land, Inc., 488 A.2d 59, 338 Pa. Super. 609 (1985) 10

Williams v. Kaiser, 323 U.S. 471 (1944) 7, 9

Wolfe v. North Carolina, 364 U.S. 177 (1960) 2, 8, 9

Rules of Court Cited — Page

Pennsylvania Rules of Civil Procedure
Rule 1026(a) 2, 3

Philadelphia Civil Rule 151 3

Philadelphia Star Rule *350 . . . . . .7, 9, 10

NO. 88-736

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVELYN WANKOFF,
ADMINISTRATRIX OF THE ESTATE
OF IRVIN WANKOFF, DECEASED, AND
EVELYN WANKOFF IN HER OWN RIGHT,

Petitioner,

vs.

THOMAS TIBBS AND CONSOLIDATED
FREIGHTWAYS CORPORATION AND
THOMAS JEFFERSON UNIVERSITY HOSPITAL,
ADDITIONAL DEFENDANT,

Respondents.

REPLY BRIEF OF PETITIONER IN OPPOSITION TO BRIEF OF RESPONDENT THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA, EASTERN
DISTRICT

JURISDICTION

The Court has proper jurisdiction, under 28 U.S.C. section 1257 (2) and (3), to review the federal constitutional issues raised by Petitioner, because: 1) the federal questions involved were timely raised and adequately drawn into question by Petitioner in the state courts of the Commonwealth of Pennsylvania; 2) the nonfederal grounds for the decision by the Superior Court of Pennsylvania were without any fair or substantial support; and 3) state courts may not avoid deciding upon federal questions and thus defeat juridiction of the Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. See Wolfe v. North Carolina, 364 U.S. 177, 185 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958); and Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

STATEMENT OF THE CASE

Respondent, Thomas Jefferson University Hospital (hereinafter "University"), filed Preliminary Objections to a complaint (to join additional defendants), served on them by Respondents Thomas Tibbs (hereinafter "Tibbs") and Consolidated Freightways Corporation (hereinafter

"Consolidated"), on or about August 15, 1980. These Preliminary Objections were filed more than seventy days after the twenty day time limit for filing such Preliminary Objections, provided under Rule 1026(a), had elapsed.[1] These Preliminary objections by Respondent University, which were eventually overruled, accomplished nothing more than a delay in the discovery proceedings and confusion for the Prothonotary (Clerk of the court).

On or about August 18, 1980, and before Petitioner received notice of Respondent University's Preliminary Objections and after the Respondent University's right to file Preliminary Objections had expired, Petitioner's counsel timely filed a Certificate of Readiness with the Prothonotary in compliance with the "240 Day" Rule and Rule 151 (See Petitioner's Petition, pages 10-12).[2] Petitioner's counsel forwarded notice to all Respondents of the filing. Each Respondent, including the University, recieved a photostatic

---

[1] The complaint (to join the additional defendant, University) was filed on May 1, 1980. Therefore, according to Rule 1026 (a), the University should have responded by May 21, 1980. Respondent did not, thereby flagrantly violating the Rules of Civil Procedure.

[2] Petitioner filed the Certificate of Readiness, which was nothing more than a "coat check," because all cousel knew that the case would be ready for trial years before it would ever appear on a published trial list. (See Petitioner's Petition, A-44).

copy of the same Certificate of Readiness shown on page A-44 of Petitioner's Petition.

All Respondents, upon receiving such notice, acted as if the Certificate of Readiness had been properly filed until or about June 1986, at which time they received Petitioner's Motion to File a Certificate of Readiness Nunc pro tunc. It was at this time, almost six years after Petitioner's Certificate of Readiness was erroneously returned by the Prothonotary, that Respondents first asserted a "prejudice" allegedly caused by the trial "delay," which prejudice is an essential, but waivable, element for a judgment. (See Petitioner's Petition, page 21).

After the Court of Common Pleas of Philadelphia County (hereinafter "lower court") rejected Petitioner's Motion for Reconsideration of its order for non pros, Petitioner immediately appealed to the Superior Court of Pennsylvania (hereinafter "Superior Court"). In its voluminous brief, Petitioner timely and adequately drew into question the federal constituional issues which it now raises before this Court. Along with these federal questions, which delt with the denial of Petitioner's "day in court" as guaranteed by the Fourteenth Amendment to the Constitution of the United States, Petitioner also raised several related but nonfederal questions.

The Superior Court made reference to neither the Petitioner's federal questions nor Petitioner's nonfederal questions. The Superior Court merely restated the lower court's opinion, which erroneously relied on the decision in Austin v. Southeastern Pennsylvania Transportation Authority, 450 A.2d 98, 304 Pa. Super. 56 (1982).[3] Petitioner again raised these same federal constitutional questions in both its Petition for Allowance of Appeal and its Motion for Reconsideration of Petitioner's Petition for Allowance of Appeal, both of which were rejected without opinion by the Pennsylvania Supreme Court. Therefore, Petitioner's present Petition for Writ of Certiorari stems from the opinion by the Superior Court of Pennsylvania, which was the highest state court which actively delt with the case at bar.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURTS' NONFEDERAL BASIS FOR ITS DECISION WAS WITHOUT FAIR OR SUBSTANTIAL SUPPORT.

Petitioner three times asserted in her appellate brief to the Superior Court of Pennsylvania the federal constitutional questions

[3] One of Petitioner's nonfederal questions concerned the validity of the lower court's decision based on the Austin case.

she now presents to the Court. These specific federal constitutional questions were invoked by the Fourteenth Amendment to the Constitution of the United States, and were asserted, within the Petitioner's appellate brief, in the following manner.

Petitioner provided a detailed description of its timely filing of a Certificate of Readiness, and how its efforts were thwarted by Respondent University's untimely filing of Preliminary Objections compounded by the Prothonotary's erroneous return of the Certificate of Readiness to Petitioner. Petitioner then asserted that, had her Certificate of Readiness been properly accepted by the Prothonotary

> [she] would have [had] her day in court as guaranteed by the Constitution of the United States.

Immediately following this statement, Petitioner asserted the mistakes of fact of the lower court. These assertions placed into question the federal constitutionality of the lower court's decision, which was based on erroneous factual conclusions. These erroneous factual conclusions resulted from the lower court's failure and refusal to take testimony and/or to grant a hearing on the motion.

Petitioner further asserted that the Respondents' claims that they were prejudiced by

the trial "delay" were unfounded, because depositions were taken to secure the memories of all witnesses. Petitioner also noted that the trial waiting period was no longer than that which would normally be expected at that time of crowded court dockets and calendars. Immediately thereafter, Petitioner's brief described the lower court's misapplication of Austin in light of the fact that notice was neither given to Petitioner, nor was it alleged to have been given to Petitioner, as required under Philadelphia Star Rule *350. This portion of Petitioner's brief questioned the federal constituionality of the lower court's decision, which improperly relied on Austin.

The assertions by Petitioner, which are outlined above, were sufficient to draw the federal constitutional questions into the state court system. Therefore, Respondent University's contention that the record is "totally barren of any indication that the federal question was raised" was absolutely without support. Petitioner drew these federal matters into question in an accepted and timely fashion. See New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); and Williams v. Kaiser, 323 U.S. 471 (1944).

The fact that neither the Superior Court nor the Supreme Court of Pennsylvania (which prepared no opinion) made reference to these federal questions does not change the fact that these

questions were adequately presented by Petitioner within the state courts and that the state courts had the first opportunity to consider these federal questions. See Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Federal questions should be decided upon by the state courts; however, there are clear exceptions to this general rule. Specifically, this Court has stated that

> [i]t is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of [the] Court by putting forward nonfederal grounds of decision which are **without any fair or substantial support.**

Wolfe v. North Carolina, 364 U.S. 177, 185 (1960). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958). This exception protects the Petitioner by giving him or her an opportunity to appeal to the Supreme Court of the United States when a state court avoids a federal question by ruling upon insufficient nonfederal grounds. In the case at bar, the Superior Court of Pennsylvania skirted the issues raised by Petitioner in her appellate brief, and merely restated the opinion of the lower court, which itself was based on misapplied law and inapplicable case law.

Respondents conveniently rely on Cardinale, which notes that " . . . states are not free to avoid constitutional issues on inadequate state grounds." Cardinale at 439. The Supreme Court doctrine invoked by Wolfe, NAACP, and Cardinale, is tailor-made for the case at bar, because the state courts' decisions were based on an erroneous application of the laws of Pennsylvania and, hence, were without any fair or substantial support. Therefore, the nonfederal basis for the state courts' decisions does not preclude Petitioner from raising the federal issues she properly drew into question in the state courts. Moreover, this court has said that it is

> . . . well settled that if the independent [nonfederal] ground was not a substantial or sufficient one, "it will be **presumed** that the State court based its judgment on the law raising the Federal question, and this court will take jurisdiction."

Kaiser at 478.

Based on the Kaiser case, the Court may presume that the judgement of the Superior Court was based on federal constitutional grounds. The state courts' reliance on the Austin case was not adequate to support their judgments, because notice was not provided to Petitioner as required by Philadelphia Star Rule *350. (See Petitioner's Petition, pages 23-25). Such an absence of notice

(as admitted by all parties) constituted an unreasonable denial of due process.

There is no doubt that the Court has jurisdiction in this case.

II. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO ADEQUATELY SUPPORT ITS JUDGMENT OF NON PROS AND BY FAILING TO RECOGNIZE RESPONDENTS' WAIVER OF THE RIGHT TO A NON PROS.

For reasons set forth in her Petition for Writ of Certiorari, Petitioner takes issue with the lower court's reliance on the Austin Case. The Superior court reversed the lower court in Taylor v. Oxford Land, Inc., 488 A.2d 59, 338 Pa. Super. 609 (1985), stating that specific notice must be given. Hence, the violation of this notice, in the case at bar, was apparent per se, since all parties agree that notice was never given as specified by Philadelphia Star Rule *350.

However, the Superior Court panel, upon which Judge DelSole was a panel member (See Petitioner's Petition, A-5), failed to recognize this overt defect in the lower court's decision, despite the assertions of such in the Petitioner's brief. Oddly, it was Judge DelSole, sitting as hearing jurist, who was overturned by the Superior Court when he made a similar mistake in the Taylor case.

Notice was absent and so too was due process.

Furthermore, Respondents waiver of the right to a non pros was clear. If it can be said that Petitioner in the case at bar took no action on the case during the interim period between completion of discovery and the Petitioner's filing of a Suggestion of Death, it can just as easily be said that Respondents also took no action during that time. In fact, all parties and counsel awaited the call for trial which all knew was years in the future. Non pros against a plaintiff is usually invoked by action on the part of the defendent to which the plaintiff fails to respond. Defendants' (and plaintiff's) only action was to complete discovery, hold settlement conversations and await the trial date. The doctrine of waiver of a non pros is well established in Pennsylvania. Poluka v. Cole, 295 A.2d 132, 222 Pa. Super. 500 (1972); DeSiato v. Shahboz, 419 A.2d 798, ___ Pa. Super. ___(1980).

The lower court in the case at bar abused its discretion by denying due process of law to Petitioner (See Petitioner's Petition). Respondent University's Brief in Opposition of Petitioner's Petition contains erroneous and mistaken facts. This could have been remedied by a hearing-- the taking of sworn testimony-- sworn affidavits to support and/or justify a finding. But the record is barren of such due process proceedings. Who now will right a wrong? Or, will one injustice beget another?

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MALCOLM P. ROSENBERG, ESQUIRE
1201 Chestnut Street, 13th Floor
Philadelphia, Pennsylvania 19107
(215) 557-9690